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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 523

HERMAN BANNING AND FRANK WILLIAMS,
PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 288-301) is reported in 130 F. (2d) 330.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 28, 1942 (R. 287). A petition for rehearing (R. 303-312) was denied October 7, 1942 (R. 313). The petition for a writ of certiorari was filed November 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act

of February 13, 1925. See also Rules XI and XIII of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in failing to exclude proof and cross-examination of prior acts and misconduct of petitioners, all of which was designed to impeach their credibility as witnesses and some of which was designed to show their participation in the conspiracy charged in the indictment.

2. Whether it was proper to admit testimony to the effect that guns, ammunition, blackjack, mask and adhesive tape were found in petitioner Banning's car and apartment at the time of his arrest.

3. Whether the trial court committed reversible error in characterizing a witness for one of the petitioners in another case as a "fake detective" and in permitting evidence as to the character of a defense in another case.

STATEMENT

Petitioners, Herman Banning and Frank Williams, together with one John McMann, were indicted in the District Court for the Eastern District of Michigan on two counts charging violations of the National Stolen Property Act, 18 U. S. C. Sec. 415. The first count charged peti-

tioners and McMann with conspiring with each other and persons unknown to the grand jury to transport in interstate commerce jewelry and rings of an approximate value of \$11,000, knowing the same to have been stolen. The second count charged petitioners and McMann with the substantive offense of transporting stolen property in interstate commerce knowing the same to have been stolen. (R. 1-4.)

Petitioners were convicted upon both counts (R. 6) and were sentenced to ten years imprisonment on each, the sentences to run consecutively¹ (R. 7, 8). The Circuit Court of Appeals affirmed the conviction.

The Government's case may be summarized as follows:

In 1925 or 1926 petitioners and McMann became acquainted while the three were prisoners in the Jefferson City, Missouri, State Prison (R. 72, 156, 206). After their respective releases from prison petitioners and McMann did not meet again until the latter part of April 1940 (R. 73, 90, 94). McMann was penniless and roaming the streets of Detroit, Michigan, when, by chance, petitioners spied him (R. 73, 74, 90-92). They informed him that they had a "pretty good racket * * * a

¹The maximum sentence authorized for conspiracy is ten years. 18 U. S. C., Sec. 418a. McMann pleaded guilty to each count (R. 288) and testified for the Government (R. 70).

jewelry racket" (R. 74) and invited him to join them. Petitioners then drove McMann to Chicago, Illinois (R. 74). On the way it was understood and agreed that McMann would "stick up" the various victims when they were found since petitioners "could not get [them] on account of being photographed down on the police records and everybody knew them" (R. 74, 75). Petitioners supplied McMann with money until he could repay them from the proceeds of the contemplated robberies (R. 74, 83, 84). Petitioners and McMann traveled through the States of Ohio and Indiana in search of victims (R. 75, 76). They met with no success, however, and returned to Chicago (R. 102). The three left Chicago again about the 25th of August 1940 (R. 103) and came upon one Samuel B. Weiss, a jewelry salesman, in Fort Wayne, Indiana, on August 27, 1940 (R. 104), and trailed him from Fort Wayne to Detroit (R. 78, 79, 104-106). While waiting for a traffic light to change, McMann jumped into Weiss' car and at the point of a gun ordered Weiss to drive him around the outskirts of Detroit, through deserted roads for several hours (R. 79, 106). Petitioners followed them and at intervals McMann would order Weiss to stop the car and petitioner Williams would come up from his car to confer with McMann as to the roads which they should take (R. 29, 30, 80, 106). During these conferences, McMann would push Weiss' face down or turn it

around so that he could not see Williams (R. 28, 29). Finally, when they came to a lonely spot McMann ordered Weiss to stop. Petitioner Williams jumped in the car, seized the bags containing the jewelry and took them over to the automobile wherein petitioner Banning was waiting (R. 81). Williams then returned to the Weiss car and proceeded to tie up Weiss with the latter's necktie (R. 31, 81, 125). In the process he took Weiss' wallet and keys (R. 31, 81). Petitioners and McMann then drove back to Chicago where they disposed of the jewelry and divided the proceeds (R. 83, 84, 116). The robbery and the conspiracy just delineated constitute the offenses set out in the indictment.

There was also testimony to show that subsequent to the Weiss robbery petitioners and McMann "went out on the road * * * quite often" (R. 85). The next victim discovered by them was one Sol Roseman, another jewelry salesman. They found Roseman in Fort Wayne, Indiana, on October 16, 1940, followed him around in that city, and finally robbed him while he was at the inter-urban station waiting to catch a train (R. 85, 86). In the process of robbing Roseman, McMann hit Roseman on the head with a blackjack. Petitioner Banning also hit Roseman on the head with the "butt of his gun" (R. 86, 87). Petitioner Williams was waiting for the other two in their car, keeping the motor running (R. 87, 141, 144). Following the Roseman robbery the three returned

to Chicago, disposed of the stolen jewelry and again divided the proceeds equally (R. 89, 108).

At the trial petitioners took the stand as witnesses in their own behalf (R. 156, 187, 249, 201, 220, 241). They undertook to give a detailed statement of their lives and past records. Williams stated that his first conviction was for robbery in Texas in 1919, and that in 1921 he was convicted again of robbery, this time in Missouri. He testified further that since the time of his release from the Missouri penitentiary late in 1931 or early in 1932 he had not been arrested for or convicted of any other crime, and that from the date of his release he had been working industriously in Chicago. (R. 201, 202.) Banning testified that his first arrest and conviction was in 1923 for burglary; that in 1925, in Missouri, he was arrested and convicted again of the same offense; and that he was sent to the Missouri penitentiary for fifteen years from which institution he was released in March 1931. He testified further that in 1931 he was sentenced to 364 days for carrying a concealed weapon, but that he had not been arrested since that time. (R. 156.)

Over objection on cross-examination, petitioner Banning admitted that ten years before the present trial he had been shot by the police in Council Bluffs, Iowa, while being pursued under suspicion of bank robbery (R. 184), and that he had been engaged in violating the National Prohibition Act at the time he was arrested and sen-

tenced for carrying a concealed weapon, which conviction he had admitted on direct examination (R. 185, 186; *supra*, p. 6). Banning was also asked whether about four months before the present trial he had attempted to bribe a police officer of Calumet Park, Illinois, for the purpose of having that officer falsify his records to show that Banning was in jail there on November 13, 1939, and thereby establish an alibi for him in connection with a jewel robbery in Omaha, Nebraska, which he was then charged with having committed on that date (R. 195-199). Banning denied the incident (R. 197) and, in rebuttal, the Government introduced the testimony of the Chief of Police of Calumet Park that Banning had done so (R. 259-263).

Williams was asked, on cross-examination, over objection, whether twenty-one years ago he had not thrown red pepper in the eyes of an officer having custody of him and then shot the officer; he denied the entire incident (R. 221). He was then asked, over objection, whether he and Banning were not with one Howard Graves in Nashville, Tennessee and at that time arrested for a jewel robbery alleged to have been committed by petitioners in Omaha, Nebraska and also whether Graves was subsequently convicted of jewel robbery and sentenced to twenty-five years in the Ohio State Penitentiary (R. 227-229). He admitted his arrest, but denied knowing of Graves' subsequent

conviction (R. 228). Banning had testified also that in 1936 he was working in Minneapolis or its immediate environs (R. 186-188). The Government, over objection, introduced evidence to show that in 1936 Banning was in Nebraska with Howard Graves (R. 251-256). The Government also introduced evidence over objection to show that Graves was subsequently convicted of a jewelry robbery (R. 257-259).

ARGUMENT

I

Petitioners contend (Pet. 26) that the trial court committed reversible error in that it "received flagrantly incompetent evidence and permitted grossly improper accusation of the petitioners in the form of questions suggesting that they were implicated in unrelated crimes; [and] that * * * the court seriously prejudiced petitioners by improper comments".

The general rule relied upon by petitioners (Pet. 29, 30), which excludes evidence showing the accused has committed crimes independent of and unrelated to the offense for which he is on trial, has no application here. As the court below pointed out (R. 296), when petitioners took the stand they assumed the roles of witnesses and as such became subject to cross-examination in the same manner and to the same extent as any other witness (*Raffel v. United States*, 271 U. S. 494, 497; 3 Wigmore,

Evidence (3d ed., 1940) sec. 890).² Under the clear weight of authority, their credibility, like that of an ordinary witness, was subject to impeachment,³ by cross-examination as to acts of misconduct indicative of bad general character.⁴ 3 Wigmore, *Evidence* (3d ed., 1940), sec. 982.

Accordingly, the evidence of other acts of misconduct was, as the court below held, admissible since it reflected upon petitioners' credibility and their integrity or truthfulness, or so pertained to their turpitude as to indicate moral depravity

² See also *Simon v. United States*, 123 F. (2d) 80, 84 (C. C. A. 4), certiorari denied, 314 U. S. 694; *Fields v. United States*, 221 Fed. 242, 244-245 (C. C. A. 4), certiorari denied, 238 U. S. 640; *Coulston v. United States*, 51 F. (2d) 178, 181 (C. C. A. 10); *Murray v. United States*, 10 F. (2d) 409, 412 (C. C. A. 7); certiorari denied, 271 U. S. 673; *United States v. Buckner*, 108 F. (2d) 921, 927-928 (C. C. A. 2), certiorari denied, 309 U. S. 669; *Merrill v. United States*, 6 F. (2d) 120 (C. C. A. 9); *United States v. Frankel*, 65 F. (2d) 285, 288 (C. C. A. 2), certiorari denied, 290 U. S. 682.

³ *Raffel v. United States*, *supra*; *Fitzpatrick v. United States*, 178 U. S. 304, 315; *Reagan v. United States*, 157 U. S. 301, 305; *Madden v. United States*, 20 F. (2d) 289, 293 (C. C. A. 9), certiorari denied, *sub nom Parente v. United States*, 275 U. S. 554; *Tucker v. United States*, 5 F. (2d) 818, 823 (C. C. A. 8); 3 Wigmore, *Evidence* (3d ed., 1940), sec. 890.

⁴ *United States v. Waldon*, 114 F. (2d) 982 (C. C. A. 7), certiorari denied, 312 U. S. 681; *United States v. Dalhover*, 96 F. (2d) 355, 360 (C. C. A. 7), certiorari denied, 305 U. S. 632, rehearing denied, 305 U. S. 672; *Tierney v. United States*, 280 Fed. 322, 324 (C. C. A. 4), certiorari denied, 259 U. S. 588; *Rees v. United States*, 95 F. (2d) 784, 793 (C. C. A. 4); *Krashowitz v. United States*, 282 Fed. 599, 600-601 (C. C. A. 4); *Christopoulo v. United States*, 230 Fed. 788, 791 (C. C. A. 4).

on their part to a degree that likely would render them insensible to the obligation to speak the truth when under oath.⁵

Furthermore, as the court below held (R. 291), the testimony connecting petitioners with the robbery of Roseman was properly introduced in support of the count charging conspiracy. This testimony indicates a continuing conspiracy to commit jewel robberies and thus is relevant to show the conspiracy charged in the indictment.⁶ Similarly, the evidence connecting petitioners with Howard Graves, taken with the testimony of MeMann, showed that petitioners were members of a

⁵ It should be pointed out that the trial court cautioned the jury in its charge that petitioners were on trial only for the offenses alleged in the indictment. The trial court said "I must instruct you and very emphatically that these men are not being tried on what may have happened in Omaha or Fort Wayne, or Nashville or Calumet, Illinois, or any other place in this court. The only reason that this Court permitted the introduction of testimony showing other happenings on other dates was on the conspiracy to show the intent necessary in this case, or that it was a plan. That is the only reason that you can consider it all." (R. 274.) The trial court also instructed the jury to the same effect at the time when Government counsel sought to show that petitioner Banning was in Nebraska with Graves (R. 255, 256), a fact which, as noted, Banning failed to state in his direct testimony.

⁶ *Powers v. United States*, 223 U. S. 303, 316; *United States v. Nettl*, 121 F. (2d) 927, 929 (C. C. A. 3); *Hilliard v. United States*, 121 F. (2d) 992, 997 (C. C. A. 4), certiorari denied, 314 U. S. 627; *Metzler v. United States*, 64 F. (2d) 203, 207 (C. C. A. 9); *Nyquist v. United States*, 2 F. (2d) 504, 505 (C. C. A. 6).

group who prowled throughout the country in search of victims, that they were in association with persons engaged in such crime, and that these associations with McMann and Graves were connected in point of time and were identical in nature.⁷ In other words, the admission of evidence as to both of these incidents falls not within the general rule but within the exception "which admits evidence of acts of a similar character at or about the same time, with alleged fraudulent purpose, as bearing upon defendant's motive or intent; for example, as proving a fraudulent or criminal scheme." *Johnson v. United States*, 82 F. (2d) 500, 505 (C. C. A. 6), certiorari denied, 298 U. S. 688. See also *Shea v. United States*, 236 Fed. 97, 102 (C. C. A. 6); *United States v. Seeman*, 115 F. (2d) 371, 373 (C. C. A. 2).

Finally, even if the trial court had erred in allowing the prosecutor too wide a scope in cross-examination or in failing to exclude proof as to petitioners' participation in the Roseman robbery and their previous connection with Graves, the other evidence as to their guilt of the crimes charged in the indictment was overwhelming and, we submit, sufficient to overcome any prejudice

⁷ The court below stated properly that "Their association with persons engaged in committing such offenses had a tendency to show the conspiracy and the means, preparation, and disposition to commit the crime charged. *Kanner v. United States*, 34 F. (2d) 863 (C. C. A. 7)." (R. 297.) *Powers v. United States*, *supra*; *Metzler v. United States*, *supra*; *Blockburger v. United States*, 50 F. (2d) 795 (C. C. A. 7), affirmed, 284 U. S. 299.

which might have thereby resulted. Petitioners' argument to the contrary (Pet. 22-25), is based upon the assumption that the testimony of McMann and the other witnesses for the Government is of doubtful credibility. This assumption, however, overlooks the elementary rule that, on appeal, the evidence must be viewed in the light most favorable to the decision below. And while it is admitted that McMann's character is no more savory than that of petitioners, the jury was adequately and accurately instructed in this regard by the trial court (R. 272, 273), and the jury was obviously entitled to give full credence to his detailed account of petitioners' participation in the crimes charged in the indictment. In addition, it is to be noted that the testimony of Weiss concerning the events immediately preceding his being robbed as well as of the robbery itself corroborated exactly the testimony of McMann (R. 27-31). Also Weiss was able to identify McMann (R. 40, 41) by sight, and petitioner Williams from his voice, which he heard on the occasions when Williams conferred with McMann concerning what roads should be taken while they were forcing Weiss to drive them around the outskirts of Detroit (R. 32; 44). We submit, therefore, that if any errors did occur in the rulings complained of, they did not "affect the substantial rights of the accused" and do not now warrant reversal. *Guy v. United States*, 107 F. (2d) 288, 290 (App. D. C.); *United States v. Waldau*, 115 F. (2d) 486, 488 (C. C. C. 2).

Objection is made (Pet. 26, 28) to the testimony concerning guns, ammunition, blackjack, mask, and adhesive tape, some of which were found in the automobile which petitioner Banning was driving at the time of his arrest and the remainder of which were found in his apartment at the same time (R. 264-266). However, no error was committed by the trial court in permitting this evidence to go to the jury.

McMann testified that at all times during which the conspiracy was in effect and at the times of the robbery of Weiss and Roseman, three loaded guns were in the automobile used by him and petitioners (R. 77, 78, 82, 86, 87). Banning hit Roseman with the "butt of his gun," ordered back at the point of his gun someone present at the scene of the crime, and one of the bandits wore a mask (R. 87, 141, 143, 144).

It is well settled that implements of crime found in the possession of the accused need not be identified positively as the instruments used in the commission of the crime before they may be received in evidence.⁶ As the court below held, weapons which

⁶ *United States v. Dalhover*, 96 F. (2d) 355, 359 (C. C. A. 7), certiorari denied, 305 U. S. 632, rehearing denied, 305 U. S. 672. See also *Pederson v. United States*, 271 Fed. 187 (C. C. A. 2); *People v. Morse*, 196 N. Y. 306 (1909); *People v. Radovich*, 122 Cal. App. 176 (1932); *Simons v. State*, 107 Tex. C. R. 504 (1927); *State v. Taylor*, 159 Wash. 614 (1930).

are found in circumstances which support an inference of the likelihood of their use in the crime are permitted in evidence to show "that the accused had them for the purpose of overcoming his victim or to show a design or plan, the carrying out of which required their use" (R. 293). It is clear that a lack of positive identification of an instrument of crime affects only the weight of the evidence rather than its admissibility.⁹

III

During cross-examination petitioner Williams stated that he broke his arm while getting out of a car in Nashville, Tennessee, in 1940 (R. 233), and in explaining the incident he volunteered testimony that he was an innocent passenger in the car, that he later learned that it was being pursued by the police, and that he was on that occasion arrested and "charged with a crime of which I was eventually acquitted" (R. 234). Under questioning by the prosecutor, Williams stated that the charge was for a robbery in Omaha, Nebraska, and he repeated that he was acquitted (R. 235). The prosecutor's next question as to the nature of Williams' defense in that case was objected to and the court sustained the objection (*ibid.*). Later the trial judge, on his own motion, stated, "I am also going to reverse my ruling on the defense that these men put up at Louisville, or at Omaha, to get out of this case

⁹ *Wilson v. State*, 26 A. (2d) 770 (Md. 1942).

there" (R. 241), and, after the prosecutor had brought out that Williams' defense was an alibi, to which there was an objection (R. 242), the judge explained his reason for changing the former ruling on the ground that "the theory of the Government is here that this man is putting up an alibi, and they are trying to show that in another case, in a similar instance, when he was arrested, it was the same defense, an alibi" (*ibid.*). Williams then elucidated upon the evidence adduced in the Omaha case, and in the course of this testimony he described one of his witnesses variously as a "retired detective," "police officer," and the owner of "a private detective agency" (R. 242-243). Following this testimony Williams was dismissed from the stand (R. 244), but the next day he was recalled and the Omaha case was reopened for further examination (R. 245-246). After some re-cross examination, and when Williams on re-direct examination attempted to repeat the testimony of his witnesses in the Omaha trial, the following colloquy ensued (R. 248):

The COURT: We are not going to go over that part of yesterday. I remember the sheriff and the deputy sheriff of Wayne County, Nebraska. You are not going to repeat the whole thing of yesterday. You told about Sheriff Fass.

A. I have something more to add.

The COURT: You told about that fake detective, what do you call him, private detec-

tive, as former detective on the force. You gave the names of everybody. There is no use repeating that. If you have got something that you want your attorney to ask, to bring out, step down from the stand and talk to him. We are not going to rehearse the whole thing. If there is something that you want brought out, I will give you a chance to bring it out.

There was no objection to this at the time; instead, Williams' counsel, after a conference with him, stated that what Williams had in mind had "been gone over" (R. 249).

On appeal (see R. 301), as here (Pet. 5-6, 10, 19, 29, 32, 40), petitioners contended that the trial judge's passing reference to one of Williams' witnesses in the Omaha trial as a "fake detective" constituted reversible error. Additionally, they claim that the judge erred in permitting Williams to be cross-examined as to the identity of his witnesses and the nature of his defense in that case (Pet. 2-3, 5, 9, 10-11, 19, 27-28, 30). Neither contention has merit.

a. In respect of the latter contention, the record shows that Williams' testimony, concerning his witnesses at the Omaha trial and the evidence they gave, was largely voluntary and was offered by him in explanation of his arrest in Nashville, Tennessee, on the Omaha robbery charge (R. 234, 243). There can, therefore, be no basis for a claim of error in this testimony. Nor was there any

error in permitting the prosecutor to show by cross-examination that Williams' defense in the Omaha case was an alibi. As the court below held (R. 300-301), the cross-examination as to the Omaha case was apposite to refute Williams' testimony on direct examination, that he had not been arrested for or convicted of any crime after his release from the Missouri penitentiary. As it affected his credibility as a witness, it was entirely competent (*supra*, p. 9). Also, since his defense in that case as this one was an alibi, the specific inquiry complained of was likewise material to the issue of credibility. This is particularly so in view of Witness Pigga's testimony regarding Banning's offer to bribe him to frame an alibi (R. 259-263).

b. While admittedly the trial judge's passing reference to the witness in the Omaha trial as a "fake detective" was indiscreet and improper, it is clear, as the court below held (R. 301), that no prejudice resulted. Moreover, there was no objection to the judge's remark (R. 249), and a reviewing court will not consider an objection not made at the proper time during the trial unless it appears on the face of the whole record that a clear and undeniable prejudice resulted therefrom.¹⁰ The only defects in the record are technical defects

¹⁰ *Optner v. United States*, 13 F. (2d) 11 (C. C. A. 6); *Meadows v. United States*, 82 F. (2d) 881 (App. D. C.); *Addis v. United States*, 62 F. (2d) 329 (C. C. A. 10), certiorari denied, 289 U. S. 744.

which do not affect petitioners' substantial rights. Therefore the record amply supports the judgment of the Circuit Court of Appeals.¹¹

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or any question of general importance. We submit respectfully, therefore, that the petition for a writ of certiorari should be denied.

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DECEMBER, 1942.

¹¹ *Glasser v. United States*, 315 U. S. 60.

